

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CIRCLE OF FRIENDS ADHC, INC.	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
FELIX NEDLER, FRIDA VAYSMAN,	:	
INNA PROSHAK, STEVEN	:	
PROSHAK, BORIS TREYZON and	:	
TREYZON & ASSOCIATES	:	NO. 05-2976
Defendants	:	
	:	
FELIX NEDLER, FRIDA VAYSMAN,	:	
INNA PROSHAK, and STEVEN	:	
PROSHAK	:	
Third-Party Plaintiffs	:	
	:	
v.	:	
	:	
LEONID GORBATOV and ALEXANDER	:	
GRIZOTSKY	:	
Third-Party Defendants :	:	
	:	
	:	

ORDER & MEMORANDUM

ORDER

AND NOW, this 18th day of April, 2006, upon consideration of the Motion to Dismiss the Complaint Against Boris Treyzon and Treyzon and Associates (Document No. 50, filed March 3, 2006), the Motion for Partial Judgment on the Pleadings as to Counts I and II Against Defendants Felix Nedler, Frida Vaysman and Inna Proshak (Document No. 51, filed March 3, 2006), and Plaintiffs' Omnibus Memorandum of Law in Opposition to Motion of Nedler, Vaysman and Proshak for Judgment on the Pleadings Dismissing Counts I and II of Complaint, and in Opposition to Motion of Treyzon and Treyzon & Associates to Dismiss Complaint As To

Them (Document No. 54, filed March 24, 2006), and good cause appearing, for the reasons set forth below, **IT IS ORDERED**, as follows:

1. The Motion to Dismiss the Complaint Against Boris Treyzon and Treyzon and Associates (Document No. 50, filed March 3, 2006) is **DENIED**.

2. The Motion for Partial Judgment on the Pleadings as to Counts I and II Against Defendants Felix Nedler, Frida Vaysman and Inna Proshak (Document No. 51, filed March 3, 2006) is **DENIED**.

MEMORANDUM

I. INTRODUCTION

Presently before the Court, there are two motions, namely the Motion to Dismiss the Complaint Against Boris Treyzon and Treyzon and Associates (Document No. 50, filed March 3, 2006) (“Motion to Dismiss”), and the Motion for Partial Judgment on the Pleadings as to Counts I and II Against Defendants Felix Nedler, Frida Vaysman and Inna Proshak (Document No. 51, filed March 3, 2006) (“Motion for Partial Judgment”). For the reasons set forth in this Memorandum, both motions are denied.

II. BACKGROUND

Because the procedural history of this case is complicated, the Court summarizes only the background necessary to resolve the pending motions.¹

Plaintiff Circle of Friends ADHC, Inc. (“Circle of Friends”) is a corporation that provides

¹ By Order dated January 30, 2006, the Court granted a motion to consolidate this case with Nedler v. Vaisberg (05-6113) with respect to discovery, but deferred ruling on a consolidation of the matters pending for trial.

daytime care services for senior citizens in Philadelphia, Pennsylvania. Its office is located at 9405 Bustleton Avenue, Philadelphia, PA 19115. Compl. at ¶ 2.

Defendant Felix Nedler is a resident of New York. Defendant Frida Vaysman is a resident of California. Nedler and Vaysman are shareholders and officers of Circle of Friends. At times relevant to this action, they were the two controlling shareholders of the corporation. Id. at ¶¶ 3-4.

Defendant Inna Proshak (“Inna”) is a resident of California. She claims to be a ten-percent shareholder of Circle of Friends, since she was given such shares by her mother, Vaysman. Id. at ¶ 5. Defendant Steven Proshak (“Steven”) is a resident of California, and is Inna’s husband. Id. at ¶ 6.

Defendant Boris Treyzon is a resident of California and a licensed attorney. At times relevant to this action, Treyzon represented Nedler and Vaysman. Id. at ¶ 7. Defendant Treyzon & Associates (“Associates”) is either a sole proprietorship or a partnership based in California that provides legal services. Id. at ¶ 8.

On June 22, 2005, plaintiff filed a Complaint in federal court against aforementioned defendants.² The Complaint alleged the following counts:

² Thereafter, defendants Nedler, Vaysman, and Inna, individually and derivatively on behalf of Circle of Friends, and Steven, individually and derivatively on behalf of Odessa Partners, LLC, filed a Third Party Complaint against sixteen individuals and corporations. See Answer, Affirmative Defenses of Nedler, Vaysman and Steven and Inna Proshak, Third Party Complaint of Nedler, Vaysman and Inna Proshak Individually and Derivatively On Behalf of Circle of Friends ADHC, Inc. And Third Party Complaint of Steven Proshak Individually and Derivatively on Behalf of Odessa Partners, LLC. (Document No. 3, filed August 29, 2005); First Amended Third Party Complaint of Nedler, Vaysman and Inna Proshak Individually and Derivatively on Behalf of Circle of Friends AHDC, Inc. And Third Party Complaint of Steven Proshak Individually and Derivatively on Behalf of Odessa Partners, LLC (Document No. 5, filed September 13, 2005); Second Amended and Restated Third Party Complaint of Nedler, Vaysman

- Count I: Conversion against Treyzon, Associates, Nedler, Vaysman, and Inna Proshak;
- Count II: Fraud against Nedler and Vaysman;
- Count III: Waste and Conversion against Nedler;
- Count IV: Conversion against Nedler and Vaysman;
- Count V: Theft of Corporate Opportunity against Nedler and Vaysman;
- Count VI: Conversion against Nedler and Vaysman;
- Count VII: Breach of Fiduciary Duty against Nedler and Vaysman;
- Count VIII: Conversion against Steven Proshak;
- Count IX: Conspiracy against All Defendants

On March 3, 2006, defendants, all represented by the same counsel, filed the Motion to Dismiss and the Motion for Partial Judgment. Although counsel erred in filing these motions, the Court will assume that the Motion to Dismiss was properly filed pursuant to Rule 12(b)(6) and the Motion for Partial Judgment was properly filed pursuant to Rule 12(c).³

and Inna Proshak (Document No. 34, filed November 23, 2005). By Order (Document No. 44, dated January 30, 2006), the Court granted a motion to dismiss all third-party defendants, except Leonid Gorbатов and Alexander Grizotsky. None of the third-party complaints are relevant to the pending motions.

³ Counsel erred in filing these motions. The Motion to Dismiss the Complaint Against Boris Treyzon and Treyzon and Associates (Document No. 50, filed March 3, 2006) includes a supporting memorandum of law that argues that “Nedler, Vaysman and Inna Proshak move for partial judgment on the pleadings as to Counts I and II pursuant to Fed. R. Civ. P. 12(c).” Memo. 2. The Court further notes that the Motion for Partial Judgment on the Pleadings as to Counts I and II Against Defendants Felix Nedler, Frida Vaysman and Inna Proshak (Document No. 51, filed March 3, 2006) includes a supporting memorandum of law that argues that “Treyzon and Treyzon & Associates move to dismiss Count I pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.” Memo. 2. Clearly, counsel mixed up the two supporting memoranda of law. Nevertheless, the Court construes the two motions as if they were properly filed with appropriate memoranda of law.

III. STANDARD OF REVIEW

When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them, and it must refrain from granting a dismissal unless it is certain that no relief can be granted under any set of facts which could be proved. See Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)). A motion for judgment on the pleadings under Rule 12(c) is judged under the same standards as a motion to dismiss pursuant to Rule 12(b)(6). See Jubilee v. Horn, 975 F. Supp. 761, 763 (E.D. Pa. 1997), aff'd, 151 F.3d 1025 (3d Cir. 1998).

IV. DISCUSSION

In Count I, plaintiff alleges that Treyzon, Associates, Nedler, and Vaysman intentionally converted at least \$ 401,500 that belonged to Circle of Friends. Compl. at ¶¶ 23-25. In Count II, plaintiff alleges that Nedler and Vaysman committed fraud by representing that payments made to Nedler, Vaysman, Treyzon and/or Associates would be deposited with Circle of Friends and used for the corporation's business purposes, when in fact Nedler and Vaysman falsely made those representations. Id. at ¶¶ 28-30. Circle of Friends alleges that it suffered injuries as a result of the alleged conversion and fraud. Id. at ¶¶ 26, 31.

In the Motion to Dismiss, Treyzon and Associates argue that the Complaint against them should be dismissed in its entirety.⁴ In the Motion for Partial Judgment, Nedler, Vaysman, and Inna argue that they are entitled to partial judgment on the pleadings as to Counts I and II.

⁴ Only Counts I and II of the Complaint implicate Treyzon and Associates, and only Count I alleges wrongdoing against these defendants.

The basis for defendants' arguments is a document attached to both motions entitled, "Contract for Sale of a Partial Interest in Corporation." Motion to Dismiss, Ex. B; Motion for Partial Judgment, Ex. B. Defendants argue that this contract governed the transaction underlying plaintiffs' claims in Counts I and II against Treyzon, Associates, Nedler, Vaysman, and Inna. Defendants contend that the contract shows that the transaction at issue "cannot, under any circumstances, be interpreted" as plaintiffs allege it did. Motion to Dismiss at ¶ 7; Motion for Partial Judgment at ¶ 7.

Defendants' efforts to have the Complaint dismissed under Federal Rule of Civil Procedure 12 on this basis must fail at this stage of the proceedings. In evaluating motions to dismiss, courts generally "are not permitted to go beyond the facts alleged in the complaint and the documents upon which the claims made therein were based." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997); see also In re: Linerboard Antitrust Litigation, 2000 U.S. Dist. Lexis 14433, *27 (E.D. Pa. 2000). The Court of Appeals has held that a court may consider "certain narrowly defined types of material without converting the motion to dismiss" to a motion for summary judgment, see In re Rockefeller Center Properties, Inc. Sec. Litig., 184 F.3d 280, 286 (3d Cir. 1999); however, this narrow class of material may only include a "document integral to or explicitly relied upon in the complaint," or an "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Id. at 287. See also In re: Linerboard Antitrust Litigation, 2000 U.S. Dist. Lexis 14433, *27.

The contract to which defendants point simply does not fit into these narrow categories. Plaintiffs object to the contract, stating, *inter alia*, that it "is plainly suspicious," "unenforceable

and meaningless,” and “null and unenforceable on its face.” See Plaintiffs’ Omnibus Memorandum of Law in Opposition to Motion of Nedler, Vaysman and Proshak for Judgment on the Pleadings Dismissing Counts I and II of Complaint, and in Opposition to Motion of Treyzon and Treyzon & Associates to Dismiss Complaint As To Them (Document No. 54, filed March 24, 2006) at 2; see also Ex. 1, Declaration of Joseph Mandale (testifying to facts that contest the validity of the contract). The document is therefore not undisputed and it is not integral to the Complaint. Thus, the Court may not consider it in the context of the Motion to Dismiss or the Motion for Partial Judgment. Because defendants have not offered any other basis for the granting of these motions, the motions are denied.

The Court notes that, in the alternative, defendants urge the Court to convert the two motions into Motions for Summary Judgment, and grant defendants relief on that basis. The Court denies that request. Instead, discovery will be allowed to proceed.

V. CONCLUSION

For the foregoing reasons, the Court denies both the Motion to Dismiss the Complaint Against Boris Treyzon and Treyzon and Associates, and the Motion for Partial Judgment on the Pleadings as to Counts I and II Against Defendants Felix Nedler, Frida Vaysman and Inna Proshak.

BY THE COURT:

JAN E. DUBOIS, J.